LIBRARY
SUPREME COURT

71-1228

FILED
MAR 27 1972
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

APRIL TERM, 1972

No. _____

SPENCER O. WALKER and RUBEN IVERY,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

BYRD, GROOVER & BUFORD
FLOYD M. BUFORD
165 First Street
Macon, Georgia 31201

JEAN BEENE
Post Office Box 782
Macon, Georgia 31202
Attorneys for Petitioners

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3080

TABLE OF CONTENTS

Opinions Below 1
Statement of Jurisdiction 2
Question Presented for Review 2
Constitutional Provision Involved 2
Statement of the Case 3
Statement of Facts 5
Manner in Which Federal Question Was Raised 7
Argument in Support of Reasons for Allowance of Writ 8
Conclusion 11
Certificate of Service 11
Appendix A—Opinion Entered January 11, 1972 ..... A1
Appendix B—Order Denying Petition for Rehearing A5
Appendix C—Judgment A6
Appendix D—Appellants' Petition for Rehearing A7
Appendix E—Order Granting Motion for Stay of Mandate A15

Table of Authorities

CASES

Kotteakos v. *United States*, 328 U. S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946) 8, 9, 10
Monroe v. *United States*, 234 F. 2d 49 (D.C. Cir. 1956) .. 7, 10

IN THE

SUPREME COURT OF THE UNITED STATES

APRIL TERM, 1972

No. _____

SPENCER O. WALKER and RUBEN IVERY,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioners, Spencer O. Walker and Ruben Ivery, respectfully show:

OPINIONS BELOW

The opinion below was rendered by the Fifth Circuit Court of Appeals in *United States of America* v. *Spencer O. Walker and Ruben Ivery,* No. 71-2165, and entered on January 11, 1972. A copy of said opinion is appended hereto as Appendix "A". The Petition for Rehearing was denied on February 29, 1972, without an opinion. A copy of the denial of the Petition for Rehearing is appended hereto and marked Appendix "B".

STATEMENT OF JURISDICTION

The Judgment of the Fifth Circuit Court of Appeals herein sought to be reviewed was rendered and entered on January 11, 1972. A copy of this Judgment is appended hereto as Appendix "C".

A Petition for Rehearing was denied by the Court of Appeals for the Fifth Circuit on February 29, 1972, and a copy of that Order is appended hereto as Appendix "B". Within thirty (30) days thereafter this Petition was filed.

Jurisdiction of this Court to review the Judgment in question is conferred by 28 U.S.C. Section 1254 (1) in that petitioners were defendants in a criminal case in the United States District Court for the Middle District of Georgia and the Court of Appeals for the Fifth Circuit has affirmed the Judgment of that Court which was adverse to the petitioners.

QUESTION PRESENTED FOR REVIEW

I.

Was it error for the Court below to affirm the conviction of petitioners when the indictment charged them with one general conspiracy and the proof offered at trial conclusively showed three or more separate conspiracies.

CONSTITUTIONAL PROVISION INVOLVED

I.

The Fifth Amendment to the Constitution of The United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when

in actual service in time of war or public danger; nor jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S.C.A. Constitution Amendments 1 to 5 at p. 297.

STATEMENT OF THE CASE

On December 10, 1970, a Grand Jury for the Middle District of Georgia returned a one count indictment against the appellants Spencer Walker and Ruben Ivery. (R. 3) The indictment charged the appellants with conspiracy to defraud the United States Government by manufacturing, distilling, transporting distilled spirits on which the tax had not been paid in violation of 18 U.S.C. Section 371. (R. 4) The indictment charged the appellants with conspiracy to possess unregistered stills which is a violation of 26 U.S.C. Section 5601 (a)(1); conspiracy to engage in the business of distillers of liquor without giving bond in violation of 26 U.S.C. Section 5601 (a)(4); conspiracy to conceal quantities of distilled spirits on which the tax had not been paid in violation of 26 U.S.C. Section 7206 (4). (R. 4)

On January 7, 1971, the appellants Spencer Walker and Ruben Ivery entered pleas of not guilty to the charges alleged in the indictment. (R. 9, 10) Counsel for appellants made a motion for judgment of acquittal at the close of the government's presentation of evidence, the motion was denied. (R. 560-62)

The jury, on February 5, 1971, returned a verdict of guilty as to both the appellants, and the appellant Ivery received a two year penitentiary sentence. (R. 565-67)

The appellant Walker received a four year penitentiary sentence, both were released on bond pending the disposition of their Motion for New Trial and appeals. (R. 569) On June 8, 1971, the Court denied appellants' Motion for New Trial. (R. 576) Notice of Appeal was filed by the appellants within the time prescribed by law. (R. 576)

On January 11, 1972, the United States Court of Appeals for the Fifth Circuit affirmed the Judgment of the Lower Court, and rendered the Opinion appended hereto as Appendix "A". A timely Petition for Rehearing was filed by petitioners and is appended hereto as Appendix "D". Thereafter, the Court denied the Petition without an opinion. A copy of the Order denying the Petition is appended hereto as Appendix "B". On February 29, 1972, petitioners' Motion for Stay of Mandate was filed with the Clerk of the United States Court of Appeals for the Fifth Circuit. The Court granted petitioners' Motion for Stay of Mandate on March 8, 1972. A copy of said Order is appended hereto as Appendix "E". The Opinions referred to above have not yet been officially reported.

The Court of Appeals for the Fifth Circuit had jurisdiction to decide the Federal question here sought to be reviewed for the reason that petitioners were convicted in the United States District Court for the Middle District of Georgia, and they subsequently filed their appeal as a matter of right.

STATEMENT OF FACTS

On the basis of an informer's tip, an agent of the Americus Alcohol, Tobacco and Fire Arms Division of the Internal Revenue located an illegal whiskey still on William Cowan's property. Cowan was an alleged co-conspirator not indicted. Before the agents confiscated the non-tax paid whiskey it was removed to the premises of still another alleged co-conspirator of petitioners, William Denniston. (R. 44) The agents searched the premises of William Denniston pursuant to a search warrant and seized a large quantity of non-tax paid liquor along with six small notebooks and two checks which the government introduced as evidence against the petitioners. (R. 45)

The government produced four (4) witnesses at the trial who stated that at one time or another they were allegedly engaged in the whiskey business wth the appellant Spencer Walker. The first witness was William Denniston who testified that in 1965 he and the appellant entered into a business agreement whereby the appellant, Walker, would supply Denniston with non-tax paid whiskey for resale to Denniston's customers. (R. 137-40) He also stated that the appellant agreed to pay half of any fine resulting from the operation of the whiskey still. (R. 138) These transactions allegedly took place in Fitzgerald, Georgia. This arrangement lasted until Christmas of 1966. (R. 142) At that time Denniston stated that he became scared and that the appellant, Ruben Ivery, Walker's associate, picked up the whiskey, and he ceased operations at this time. (R. 142) Sometime after Christmas in 1965 Walker allegedly rented from William Denniston an old building located on the Denniston property. The building was formerly used for a body shop. Appellant allegedly paid $10 per week rent. In

September of the next year Mr. Denniston testified that he moved to Sylvester, Georgia, and would collect the rent on the week ends. According to Denniston he moved back to Fitzgerald in the summer of 1968. (R. 142-45) After Denniston returned to Fitzgerald he stated that the appellant gave him a job delivering whiskey to his customers. (R. 149) This arrangement between Denniston and Walker allegedly continued for almost a year. (R. 178) In June of 1969, Denniston states that he entered into a new agreement with Mr. Walker to operate a whiskey still, together with another man named Charlie Monk. (R. 179) Mr. Denniston testified that he operated this still for approximately five weeks. (R. 180) The liquor made at this still was allegedly stored in the old building that Walker rented. (R. 181)

About five months after Denniston had ceased the still operation described above, he, Charlie Monk and Spencer Walker allegedly, again, entered into a different agreement to operate the whiskey still. The State Revenue Agents, however, arrested Denniston and Charlie Monk at the still site before they were able to actually process the first batch of liquor. (R. 182, 289) Denniston was not prosecuted for maintaining this still since Charlie Monk took the entire blame for its operation. (R. 182) William Denniston further stated that in exchange for Charlie Monk taking the entire blame, he paid half of the $1,000 fine and the appellant, Walker, paid the other half. (R. 183) This still operation was destroyed pursuant to State statutes and by State agents. Charlie Monk was prosecuted in a State Court proceeding. (R. 296) Denniston testified that this still was furnished by the appellant, Spencer Walker. (R. 179-80) He also stated that the appellant Ivery assisted Walker in carrying on the illicit whiskey business in various ways. (R. 141)

The government introduced three (3) other witnesses against the appellants at the trial all of whom testified that they had been involved in an illegal whiskey business with the appellants. These witnesses were Robert Bragg, Charles Monk and William Cowan. The testimony of these alleged co-conspirators was offered as evidence against petitioners to prove one continuing conspiracy as charged in the indictment. However, the record reflects that these witnesses testified as to several separate and distinct alleged conspiracies.

MANNER IN WHICH FEDERAL QUESTION WAS RAISED

The Federal question sought to be reviewed was raised in the trial court by a timely Motion for Judgment of Acquittal. The Court denied the Motion. (R. 560-62) On Appeal to the Court of Appeals for the Fifth Circuit, petitioners contended that the trial court committed reversible error when it denied their Motion for Judgment of Acquittal enumerating several separate grounds. The Court of Appeals for the Fifth Circuit specifically ruled upon and determined the Federal question sought to be reviewed. Specifically, the Court held that "Even if we assume that a variance existed in this case, it could not affect the substantial rights of these defendants. *Monroe* v. *United States*, 234 F. 2d 49 (D.C. Cir. 1956) In addition, no danger that there could be a transference of guilt as expressed in *Kotteakos*, is present here." (See p. A3 Appendix "A")

ARGUMENT IN SUPPORT OF REASONS FOR ALLOWANCE OF WRIT

I.

The Decision of the Fifth Circuit Court of Appeals Affirming the Conviction of Petitioners Is Based upon an Erroneous Construction and Application of the Applicable Decision of This Court.

In *Kotteakos* v. *United States,* 328 U. S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), this Court enunciated the principle that the substantial rights of accused conspirators are affected when the indictment charges one general conspiracy and the evidence offered at trial proves several separate and distinct conspiracies, and that such a variance is so prejudicial to the defendants as to require a reversal of their conviction.

The opinion below clearly demonstrates an erroneous construction of the *Kotteakos,* supra, decision. The Court stated in its opinion ". . . whether a single conspiracy with different unlawful ends or multiple conspiracies were proved is immaterial in the context of this case since a review of the record convinces us that sufficient evidence was adduced to prove each defendant's connection with all three of the allegations of unlawful conduct." This statement is directly in conflict with this Court's proposed criteria to determine whether or not substantial rights have been affected.

This Court in *Kotteakos,* supra, proposed the following tests to determine when substantial rights are affected:

(1) ". . . the question is, not were they[1] right in

1. (they) referring to the jury.

their judgment, regardless of the error or its effect upon the verdict. It is rather, what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own,[2] in the total setting." at p. 1566, 90 L.Ed.

(2) "If, when all is said and done, the conviction (sic) is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand . . . but if one cannot say, with fair assurance, after pondering all that happened *without* stripping the *erroneous action from the whole,* that the judgment was not substantially swayed by the error, *it is impossible to conclude that substantial rights were not affected."* (Emphasis added)

(3) "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is . . . *whether the error itself* had substantial influence." (Emphasis added) at p. 1567, 90 L.Ed.

(4) Each case must be decided on the *particular set of facts* and circumstances *before the reviewing court,* and the court should "not be governed in any rigid sense of stare decisis by what has been done in similar situations."

The facts and circumstances of this particular case should have been weighed by the Court below with particular attention to the effect the variance had on the jury in this particular setting and not relied upon an

2. referring to reviewing court judge.

analogy from another case. The Court below cited in its opinion *Monroe* v. *United States*, 234 F. 2d 49 (D.C. Cir. 1956), as authority for its proposition that appellants' rights were not substantially affected. This is squarely in conflict with this Court's direction to view each case on its own merits as to substantial rights.

This Court in *Kotteakos*, supra, recognized the very real danger of contaminating the minds of the jurors as indicated by the following quote from the *Kotteakos* opinion: "The dangers of transference of guilt from one to another across the line separating conspiracies subconsciously or otherwise, are so great that no one can say prejudice to substantial rights has not taken place." at p. 1571, 90 L.Ed.

The variance between the general conspiracy charged in the indictment and the proof of several separate conspiracies not charged, substantially affected the rights of petitioners and denied them due process of law as guaranteed by the Fifth Amendment of the United States Constitution.

The opinion of the Court below that petitioners' rights were not substantially affected is clearly contrary to this Court's Applicable Decision, *Kotteakos* v. *United States* as set out above.

CONCLUSION

Accordingly, this petition for writ of certiorari should be granted and the judgment of the Fifth Circuit Court of Appeals should be reversed and the sentence imposed upon petitioners should be vacated and set aside.

Respectfully submitted,

BYRD, GROOVER & BUFORD

.....

FLOYD M. BUFORD

P. O. Address:
165 First Street
Macon, Georgia 31201

.....

JEAN BEENE
Attorneys for Petitioners

P. O. Address:
Post Office Box 782
Macon, Georgia 31202

CERTIFICATE OF SERVICE

This is to certify that I have this day served the foregoing Petition for Writ of Certiorari upon Mr. William J. Schloth, United States Attorney, by depositing three (3) copies of same in the United States Mail addressed to his post office address at P. O. Box U, Macon, Georgia 31202.

This 24th day of March, 1972.

.....

FLOYD M. BUFORD
Counsel of Record